STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

GERDE ENTIENNE)
)
VS.) W.C.C. 00-00611
)
JOHNSON & WALES UNIVERSITY)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on April 12, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this 31st day of September, 2002.

BY ORDER:

Dennis I. Revens Administrator

ENTER:

Healy, J.

Olsson, J.

Connor, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq., and Michael T. Wallor, Esq., on August 26, 2002.

Ann M. Katsiaficas

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

GERDE ENTIENNE)
)
VS.) W.C.C. 00-01004
)
JOHNSON & WALES UNIVERSITY)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

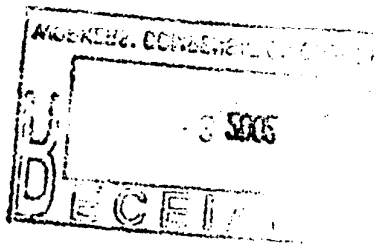
The findings of fact and the orders contained in a decree of this Court entered on April 12, 2001 be, and they hereby are, affirmed.

Entered as the final decree of this Court this 3rd day of September, 2002.

BY ORDER:

Dennis D. Revens

Dennis D. Revens Administrator



ENTER:

Healy, J.

Olsson, J.

Connor, J.

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
GERDE ENTIENNE	)	
	)	
VS.	)	W.C.C. 00-01004
	)	
JOHNSON & WALES UNIVERSITY	)	
GERDE ENTIENNE	)	
	)	
VS.	)	W.C.C. 00-00611
	)	
JOHNSON & WALES UNIVERSITY	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came on to be heard before the Appellate Division upon the petitioner/employee's appeals from an adverse decision and decrees entered on April 12, 2001. W.C.C. No. 00-00611 is an Employee's Original Petition in which the employee alleged partial disability from November 29, 1999 and continuing, as a result of a back injury which occurred on January 11, 1999. The petition was denied at the pretrial conference and the employee claimed a trial. W.C.C. No. 00-01004 is an Employee's Petition to Review alleging a return to partial incapacity from November 29, 1999 and continuing,

due to a work-related injury sustained on January 11, 1999. The petition also requests an amendment to the description of the injury to include the back. This petition was also denied at the pretrial conference and the employee claimed a trial.

After multiple continuances of the trial, a motion to close the evidence was filed by the employer's counsel which was granted by the trial judge. She then denied and dismissed the employee's petitions, finding that the employee failed to prove by a fair preponderance of the credible evidence that she sustained a work-related injury to her back or that her incapacity had returned. The employee filed this claim of appeal. After a careful review of the record and applicable law, we affirm the findings and orders of the trial judge.

A Memorandum of Agreement dated March 3, 1999 was entered into evidence indicating that the employee sustained a right leg strain on January 11, 1999 resulting in partial incapacity from January 12, 1999 and continuing. A pretrial order, entered in W.C.C. No. 99-04571 on September 7, 1999, discontinued the employee's benefits based upon the finding that her incapacity for work had ended.

At the initial hearing on September 6, 2000, counsel for the employee stated that he planned to present the employee's testimony and a deposition of Dr. Wajciech Bulczynski, in support of the employee's two (2) petitions. He indicated that he was in the process of scheduling the deposition. He also planned to cross-examine Dr. Vaughn G. Gooding Jr., who conducted an impartial

medical examination of the employee, at the request of the court at the pretrial conference stage.

On October 20, 2000, the employee testified before the trial justice. The employee testified that she is treating with Dr. Bulczynski for her back problems and that he would send her to another doctor for injections. She also indicated that she had seen Dr. Randall L. Updegrove. At the time of the initial injury, she went to Rhode Island Hospital and then began treatment with doctors at Harvard Community Health Plan.

On this same day, employee's counsel repeated his intent to depose Dr. Bulczynski, although the deposition was not yet scheduled. He also indicated that he was having difficulty obtaining the records from Harvard Health because they had gone out of business. Counsel for the employer indicated that he would provide copies of the Harvard Health records because he had them in his possession. Counsel for the employee then provided the records of Dr. Bulczynski to opposing counsel. He also advised the trial judge that he hoped to have the deposition scheduled within the next month. The matter was continued to December 11, 2000.

The matter did not go forward on December 11, 2000, and was continued on two (2) more occasions, by stipulation of the parties. A motion to close the evidence was filed on March 9, 2001, by the employer's attorney, and heard on April 4, 2001. In defense of the motion, employee's counsel told the trial justice that according to his client, Dr. Bulczynski had either left the state, or was no

longer practicing so he was unable to schedule his deposition. Counsel had never obtained an affidavit to certify the Harvard Health records and had been unable to secure records from subsequent doctors seen by the employee. Although counsel had an affidavit from Dr. Randall Updegrove's office, he had failed to forward it to opposing counsel. After listening to the arguments of counsel, the trial judge granted the motion to close the evidence, and then rendered a bench decision denying both petitions, because of the lack of medical evidence to support the allegations.

The employee raises three (3) issues on appeal: (1) whether the trial justice erred in excluding medical evidence offered, pursuant to R.I.G.L. § 9-19-27; (2) whether the trial justice erred in excluding medical evidence offered, pursuant to R.I.G.L. § 9-19-29; and (3) whether the trial judge abused her discretion in granting the motion to close the evidence.

"...[t]he admission of evidence rests in the sound discretion of the trial justice and will not be disturbed absent a showing of an abuse of that discretion." New Hampshire Ins. Co. v. Rouselle, 732 A.2d 111, 113 (R.I. 1999). The Rhode Island Supreme Court has set forth the requirements for challenging the exclusion of evidence in Caranci v. Howard, 708 A.2d 1321 (R.I. 1998) and prior cases.

> "...[T]he party challenging such a ruling bears the supplementary burden of establishing that the excluded evidence was material and that the exclusion thereof had an impermissibly prejudicial influence on the decision of the factfinder." Id. at 1325.

Furthermore, the court has stated that failure to request that the documents in question be marked for identification constitutes a waiver of the ability to challenge the trial justice's ruling, because the appellate tribunal has no basis to determine their probative value. Richmond Square Capital v. Mittleman, 773 A.2d 882, 888 (R.I. 2001).

In the present matter, the employee never requested that any of the medical affidavits or reports be marked for identification, nor was an offer of proof made as to what they may contain. We have no idea whether any of these documents would have supported the allegations of the employee's petition. Without the documents, or an offer of proof in the record, we have no basis to determine whether the exclusion of the documents may have been reversible error, or harmless error, or error at all. Based upon the foregoing, the employee has waived any argument as to the exclusion of medical evidence under § 9-19-29 and § 9-19-27.

Putting aside this fatal error, the employee's arguments, regarding the exclusion of evidence, are without merit. With regard to the employee's first argument, concerning admission of records under § 9-19-27, the record reveals that at no time during the trial or initial hearing did the employee's counsel attempt to enter evidence pursuant to this statute. The Rhode Island Supreme Court has stated, "No principle of appellate review is better settled in this state than the doctrine that this court will not consider an issue raised on appeal that

has not been raised in reasonably clear and distinct form before the trial justice." Town of Smithfield v. Fanning, 602 A.2d 939, 942 (R.I. 1992).

In the instant case, the only mention of § 9-19-27 during the trial was on April 4, 2001, when the employee's counsel admitted that the records of Dr. Randall Updegrove were not sent to opposing counsel, in accordance with § 9-19-27. (Tr. 23) He also never attempted to admit the records of Dr. Bulczynski under the statute after opposing counsel requested cross-examination of the doctor. He acknowledged that the Harvard Health records were not in a form with an affidavit to comply with the statute. (Tr. 27) Therefore, the trial judge never made a ruling excluding evidence under this statute because the evidence was never offered pursuant to the statute. Thus, the issue of whether the trial judge should have admitted records, pursuant to § 9-19-27, has been waived for the purposes of appeal.

The employee contends that the trial judge improperly applied the provisions of Rhode Island General Laws § 9-19-29 when she refused to admit the affidavit and reports of Dr. Bulczynski. Section 9-19-29(b) states:

> "In all actions for the recovery of benefits under the Workers' Compensation Act for personal injury or death . . . ,if a physician, . . . has moved out of this state prior to trial or cannot be located within this state after a reasonable search, and whose whereabouts and address are unknown, any written records, reports, or bills of the physician or dentist concerning the patient who suffered the injury or death, . . . shall be admissible in evidence and the patient may testify as to the medical or dental services provided and the treatment received, ..."

It is clear from the record that Dr. Bulczynski did not move out of state prior to the commencement of the trial. At the initial hearing on September 6, 2000, the employee's counsel made the trial judge aware of his intention to depose Dr. Bulczynski. (Tr. 4) On October 20, 2000, the employee testified that she was still treating with Dr. Bulczynski and her next appointment with the doctor was scheduled for October 30, 2000. (Tr. 10) On that date, counsel repeated his intention to depose the doctor. (Tr. 18) It appears from the record that there was no attempt to schedule the doctor's deposition between September 6 and October 20. Thereafter, the case was continued by stipulation of the parties for the employee to conduct the deposition and obtain other medical evidence. It is not until April 4, 2001 that counsel advised the court that the doctor may have left the state, according to his client.

There is also a lack of information as to what efforts were made to locate the doctor. The only representations made by counsel were during the following exchange regarding the motion to close:

> "MR. DENNIS: Then the documents of Dr. Bulczynski, I am unable to procure his cross examination. I would state that he is unavailable.
>
> "THE COURT: Where is he?
>
> "MR. DENNIS: My understanding from my client is he is out of the state. She is here. She can testify to that effect.
>
> "THE COURT: Where is he? You can call up Medical Licensure & Discipline and find out where he went.

"MR. DENNIS: We have attempted to call. He is not apparently practicing. I don't know where he has gone." (Tr. 24)

It is unclear whether counsel called the doctor's former office or the Board of Medical Licensure and Discipline to attempt to locate the doctor. It is impossible to determine when the doctor may have left the state or stopped practicing. Other than what is stated above, no other representations were made by employee's counsel about their efforts to locate Dr. Bulczynski. Such statements certainly do not constitute documentation of a "reasonable search" within the terms of the statute. The trial judge's decision to grant the motion to close implies that she found that counsel had not satisfied the conditions for admission of evidence under § 9-19-29.

The last issue for the court to consider is whether the trial judge abused her discretion by granting the motion to close the evidence and, in effect, denying the employee's request for another continuance.

"A motion for a continuance made immediately prior to, or during, a trial in order to secure the attendance of a witness is addressed to the sound discretion of the trial justice and will not be disturbed on appeal absent an abuse of discretion." State v. Firth, 708 A.2d 526, 530 (R.I. 1998). The moving party must demonstrate that the testimony of the witness would be material to her case and that due diligence was exercised in trying to procure the attendance of the witness or their deposition. Id.

There is nothing in the record to establish that any of the medical evidence, which the employee sought to introduce from her previous physicians or current physicians, was "material" to her case and would support the allegations of her petition. The employee's counsel stated that Dr. Bulczynski's records and deposition would be material to the employee's case, but there was no indication as to what his reports or testimony would reveal, and his affidavit and reports were not submitted for identification. Also, there is nothing in the record to indicate that due diligence was exercised in procuring the doctor's deposition. Multiple continuances, to schedule the deposition, were allowed by the trial judge before she granted the motion to close on April 4, 2001, and no problems with the doctor's availability were made prior to the hearing on the motion.

The employee urged the court to allow a continuance to obtain medical reports from two (2) physicians she began treating with sometime after her testimony but prior to April 2001. However, there is no indication as to when she began treating with these doctors, what they were treating her for, or what opinions they may render regarding the allegations of her petition. It should be noted that the employee was alleging a back injury occurred on January 11, 1999 and that she had a return of incapacity beginning November 29, 1999.

Considering the time which had lapsed since the initial hearing, the number of continuances already granted for the same purpose, and the absence of any showing as to the probative value of the evidence and the diligence exercised, we find that the trial judge did not abuse her discretion in granting the motion to

close the evidence and denying the employee's motion for a continuance. The decision and decrees of the trial judge are, therefore, affirmed and the appeals of the employee are denied and dismissed.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, decrees, copies of which are enclosed, shall be entered on September 3, 2002 at 10:00 a.m.

Healy, and Connor, JJ. concur.

ENTER:

Healy, J.

Olsson, J.

Connor, J.